SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 10 1974
MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

NO. 73-2004

ISAAC WASHINGTON, PASQUALE SOLE, PETER RINALDI,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

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MIAMI REVIEW — 371-4053 — 377-3721

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Petitioners Issac Washington, Pasquale Sole and Peter Rinaldi pray that a Writ of Certiorari issue to review the judgment and opinion of the Third District Court of Appeals for the State of Florida entered in this proceeding on April 30, 1974.

OPINIONS BELOW

The opinion of the Third District Court of Appeals (unreported) appears in the appendix (Ap. A)

JURISDICTION

The judgment of the Third District Court of Appeals for the State of Florida was entered on April 30, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The decision of the Third District Court of Appeals on the issue presented in this petition constitutes a judgment rendered by the highest court of the State of Florida in which a decision could be had. As to the constitutional issues presented in this petition, no appeal could be taken to the Florida Supreme Court in that there were no conflicting District Court opinions either within one district or between any two of the several districts of Florida. The decision herein sought to be reviewed therefore constitutes a final judgment rendered by the highest Court of a State in which a decision could be had.

QUESTION PRESENTED

WHETHER A SURREPTITIOUS INTERROGATION BY UNDERCOVER POLICE OFFICERS CONDUCTED AFTER THE FORMAL COMMENCEMENT OF PROSECUTION AND ISSUANCE OF ARREST WARRANTS VIOLATES THE PROVISIONS OF THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."
Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

The petitioners were charged, tried and convicted in Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida as follows:

1. Each of the petitioners, along with other defendants not parties to this petition, were convicted of conspiracy to commit robbery and conspiracy to commit grand larceny.

2. The petitioner Sole was also convicted of carrying a concealed firearm and carrying a firearm during the commission of a felony.

3. The petitioner Rinaldi was also convicted of carrying a concealed weapon.

Subsequent to their conviction and sentencing, the Petitioners took a consolidated appeal to the Third District Court of Appeals. The constitutional issue presented in this petition was raised before that court.

The Third District Court of Appeals reversed the convictions and sentences for conspiracy to commit grand larceny as duplicitous, but affirmed the judgments and sentences in all other respects.

Each of the Petitioners now face lengthy prison terms as follows:

Isaac Washington	5 years
Pasquale Sole	11 years
Peter Rinaldi	6 years

The decision sought to be reviewed involves the admissibility of statements made by the petitioners during a surreptitious interrogation by undercover police officers, after the filing of a sworn information, the formal commencement of prosecution under Florida criminal procedure, and after the issuance of arrest warrants. The petitioners submit that the failure of the police officers to advise them that they were the subject of a criminal prosecution (that an information had been filed and warrants were outstanding) deprived them of their constitutional right against self-incrimination under the Fifth Amendment of the United States Constitution. In addition thereto, the Petitioners submit that the surreptitious interrogation by police officers deprived them of their right to counsel at a critical stage of the prosecution: post indictment (information) interrogation.

The facts giving rise to these constitutional issues, briefly summarized in the Third District Court's opinion, are as follows:

Undercover officers of the Dade County Public Safety Department allegedly uncovered a conspiracy to rob the safety deposit boxes at the Doral Beach Hotel. On Feb-

ruary 25th, 1973, two such officers met with the petitioners Washington, Sole and others but not Rinaldi. This meeting was recorded by means of a concealed device which transmitted the conversation to an outside receiver. The meeting ended with an agreement by those present to meet again the next night.

On February 26, 1973, but preceding the meeting, the undercover officers went to the State Attorney's Office and caused an information to be filed. The information charged the petitioner Washington, and three "John Does" one of whom was later determined to be Sole with conspiracy to commit robbery. Arrest warrants were issued and accepted by the police officers.

That evening, the undercover officers met with the petitioners. The ensuing conversation was taped in the same manner as the previous evening. The petitioners were unaware that the officers were policemen or that the conversation was recorded. At the conclusion of the meeting and prior to anyone leaving the meeting place, the officers arrested the petitioners.

Other pertinent facts not set forth in the District Court opinion include:

The Trial court originally suppressed the statements and tape recordings of February 26th, stating:

> "If they made a statement to a police officer after an information is filed, it will not be admitted unless they were warned of their rights under the Miranda, Massiah, and every other case I can think of." (F 107)

> "The only thing I am suppressing, for your benefit, are statements that may have been made without warning the defendants of their rights after criminal charges were filed against them. And I do not think any Appellate Court will reverse me on that." (R 200).

For reasons unknown, the trial court subsequently reversed its original order and denied the Defendants' motion to suppress (SR 65) (R 844-847).

The undercover officers themselves disclosed that the arrest warrants were in their possession but notwithstanding this they testified:

> "The purpose in attending the meeting was to further supply these people with the information that they had requested in gaining the information that we as police officers give in successfully arresting and prosecuting these individuals." (R 243)

The officers also testified that they had previously agreed to arrest the people who appeared at the meeting of the 26th for whom capias were outstanding (R 242) and to arrest the Petitioner Washington if anyone tried to leave the meeting.

As to the petitioner Rinaldi, since the meeting of February 26th was his first contact with any of the undercover agents, no information had been filed against him nor had a capias been issued. Nonetheless, the officers had agreed to arrest whoever showed up for the meeting.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE BASIC CONSTITUTIONAL RIGHT TO ASSISTANCE OF COUNSEL AND RIGHT AGAINST SELF-INCRIMINATION UNDER THE SIXTH AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The Sixth Amendment guarantees that a criminal defendant shall enpoy the right "to have assistance of counsel for his defense."

The petitioners submit that a deliberate, planned surreptitious interrogation after the filing of an information and issuance of arrest warrants effectively deprived them of their right to counsel at a critical stage of the prosecution. Unquestionably, the filing of a sworn information and the issuance of arrest warrants constitutes the commencement of criminal adversary proceedings.

In *Massiah v. United States*, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964), this court held that the deliberate, surreptitious elicitation of incriminating statements from a defendant by a government agent after he has been indicted, retained an attorney, and has been arraigned violates the Sixth Amendment right to counsel.

In the case below, an information, the equivalent of an indictment under Florida Criminal procedure had been filed against two of the petitioners. Although in possession of arrest warrants, the officers, armed with a concealed

transmitter, held a subsequent one hour meeting with the petitioners to elicit evidence from them regarding the crime with which they had already been charged. The petitioners were not advised that an information had been filed; were not advised of their right to counsel, and were not advised of their rights against self-incrimination under the Fifth Amendment.

Applying *Massiah*, *supra*, to a similar situation, the Fifth Circuit in *United States v. Hayles*, 471 F.2d 788 (1973), stated:

> "Massiah teaches that although the government may properly continue to gather evidence against a defendant after he has been indicted, it may not nullify the protection *Miranda* affords a defendant by using trickery to extract incriminating statements from him that otherwise could not be obtained without first giving him the required warnings."

It is submitted that the deliberate failure of the police to advise the Petitioners that an information had been filed and their deliberate failure to make an immediate arrest constitutes precisely such trickery. Needless to say, if the petitioners had been advised that an information had been filed, that they were under arrest, or that they had the right to counsel, no lengthly statements would have been made. The motive of the police in concealing these facts is made obvious by the presence of the concealed transmitter at the post-information meeting. If the police only intended to execute the warrants why did they go to such great care in planning the recordation of the meeting. If the police only intended to execute the

warrants why then did they not do so immediately instead of drawing from the petitioners the conversations uttered during the hour-long meeting.

The District Court of Appeals rejected the applicability of *Massiah*, stating:

> "We hold that the holding in Massiah is not applicable to the recording of a meeting held before arrest where, as here, the meeting had already been arranged prior to the filing of an information."

Petitioners urge that the District Court erroneously concluded that the *arrest* constitutes the commencement of the criminal adversary proceeding for purposes of right to counsel and right to silence warnings. Ordinarily, such is the case where the police are making an on-the-scene "probable cause" arrest. Where, however, the State Attorney files an information and warrants are issued thereon, the adversary proceeding (prosecution) commences and the arrest is only a subsequent step therein.

In its brief before the Third District Court of Appeals the State of Florida argued that this Court's ruling in *Hoffa v. United States*, 385 U.S. 293, 17 L.Ed.2d 374, 87 S.Ct. 408 (1965), applied and that petitioners had no constitutional right to be arrested. Petitioners submit that the State of Florida, the trial court, and the Third District Court of Appeals have misinterpreted *Hoffa*. In it this Court stated:

> "There is no constitutional right to be arrested. The police are not required to guess at their peril

> the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment, if they act too soon and a violation of the Sixth Amendment if they wait too long. . . ."

Accordingly, where a probable cause determination has been made, as evidenced by the filing of an information and issuance of warrants, then, at that point, the right to counsel and its attendant warnings attaches. Likewise, the right to *Miranda* warnings also attach.

With respect to the initiation of the criminal adversary proceeding, the Supreme Court of Florida in *Chaney v. State*, 267 So.2d 65 (1972), adopted the reasoning of *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), thusly:

> "The initiation of judicial criminal proceedings is far from a mere formality. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the procedural criminal law. *It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.* See *Powell v. Alabama*, 287 U.S. 45, 66-71, 53 S.Ct. 55, 63, 77 L.Ed. 158; *Massiah*

v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 1265, (Douglas, J., concurring)."

The judicial proceedings having commenced, the petitioners had a constitutional right to be apprised of the nature of the charges against them, their right to counsel and rights under the Fifth Amendment.

Petitioner Rinaldi submits that although no information had been filed against him and no warrant issued the investigation had sufficiently "focused" on him to the point that he should have been advised of his rights under the Fifth and Sixth Amendments. *Hayles, supra*, recognized the principle that at the point an individual undisputedly becomes the focus of an investigation the Government is therefore precluded by the Fifth Amendment from surreptitiously extracting incriminating statements.

It is submitted that with respect to Rinaldi, *United States v. Hayles*, and *Miranda v. Arizona*, both *supra*, are dispositive and reversal is warranted, especially since there is no evidence to support his conviction of conspiracy other than what was uttered on February 26, 1973.

The exclusion of the statements elicited on February 26, 1973, from the petitioners Washington and Sole would deprive the State of the sole evidence of any agreement to commit robbery, an essential element of the crime of conspiracy. So critical was the taped conversation of the 26th to the State's case that when the prosecution heard the court's first order suppressing the statements of February 26th they filed Notice of Appeal (R 199). This prompted the trial court to properly summarize the issue thusly:

> "Let me say this, if you did not have a case to file an Information before this case got started, and now, because the court says that a man must be warned of his rights after he is charged by a criminal indictment or information, and I have denied all their motions to suppress and everything, during the course of the conspiracy and because of some statement that was made without warning one of the defendants of his rights . . . if you want to delay this whole case, that is up to you, but it would not be admissable against any of the other defendants anyway." (R 202).

The petitioners submit that the right to counsel attaches when the investigation focuses, an information is filed, and warrants are issued, not when police officers in possession of arrest warrants issued on formal charges exercise their discretion and finally decide to effect an arrest.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Third District Court of Appeal for the State of Florida.

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By James J. Hogan

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this ____ day of July, 1974, to the office of the Attorney General, 1350 N.W. 12th Avenue, Miami, Florida.

James J. Hogan

APPENDIX

APPENDIX

APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1974

CASE NO. 73-622

WILLIAM SCALDEFERRI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 73-621

PHILLIP POMPEO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

App. 2

CASE NO. 73-643

PETER RINALDI,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 73-644

PASQUALE SOLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CASE NO. 73-805

ISAAC WASHINGTON,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed April 30, 1974.

Appeals from the Circuit Court for Dade County, Arthur E. Huttoe, Judge.

Milton E. Grusmark; Cohen & Hogan; Melvyn Kessler; Cagney & Tifford; Harvey S. Swickle, for appellants.

Robert L. Shevin, Attorney General, and Linda C. Hertz, Assistant Attorney General, for appellee.

Before PEARSON, CARROLL and HENDRY, JJ.

PER CURIAM.

The appellants are: Isaac Washington, Pasquale Sole, Peter Rinaldi, Phillip Pompeo and William Scaldeferri. They were tried together and each was convicted of (1) conspiracy to commit robbery and (2) conspiracy to commit grand larceny. In addition, Sole was found guilty of carrying a concealed weapon during the commission of a felony and Rinaldi was found guilty of carrying a concealed weapon. Each has appealed his judgment and sentence and the five appeals are the subject of this decision.

The evidence shows that two men from the Dade County Public Safety Department, acting in the capacity of undercover agents on Miami Beach, reported that a conspiracy to rob the safety deposit boxes of the Doral Beach Hotel was underway. On February 25, 1973, the two undercover agents met with defendants Washington, Sole, Pompeo, and Scaldeferri. One of the agents was equipped with a concealed device which transmitted the

conversation to an outside receiver. The overhead conversation was taped by other officers conducting a concurrent surveillance. The meeting ended around 10:00 p.m., with an agreement to meet the following evening.

On February 26, 1973 (preceding the planned meeting), an information was filed by the State Attorney, naming defendant Washington, and describing three "John Does," who were later determined to be defendants Sole, Pompeo and Scaldeferri. The trial judge determined that such information had been filed at approximately 4:10 p.m. Capias warrants were thereupon issued for the four defendants and accepted by a police sergeant.

That same evening, the two undercover agents kept their prearranged appointment at defendant Washington's motel room. Only defendants Washington, Sole and Rinaldi were present. The ensuing conversation was taped in the same manner as the previous evening, the defendants being unaware that the agents were policemen or that the conversation was taped. At approximately 11:00 p.m., the meeting ended and defendants Sole and Rinaldi exited the motel room. Washington was arrested immediately. Sole and Rinaldi were arrested after they had exited the motel room. Defendants Pompeo and Scaldeferri were arrested the following morning.

The appellants have filed a consolidated brief containing seven points. Not all of the points are applicable to all the appellants. With one exception, the points will be examined in the order presented by the appellants' brief.

The first point urges that the trial court erred in admitting into evidence testimony and tape recordings of conversations of the defendants with the undercover police officers which occurred subsequent to the filing of the information. This point is applicable to Washington, Sole, Pompeo, and Scaldeferri.

As to the appellant Washington, this point does not present reversible error because the alleged error would be, if error, harmless. There was clear and convincing evidence elicited from the police officers that Washington was planning a robbery of the safety deposit boxes. He was the instigator and he proceeded to set up the subsequent meetings which were facts whether or not the taped conversations were admitted into evidence. Cf. State v. Wadsworth, Fla. 1968, 210 So.2d 4; United States v. Hayles, 471 F.2d 788 (5th Cir. 1973).

The appellants rely principally upon Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) for reversal upon the point presented. In that case, after an indictment had been returned charging Massiah and another man, the government concealed a radio transmitter in a place where the codefendants met. The codefendant who was cooperating with the government elicited incriminating statements from Massiah. This was done after Massiah was arrested, employed an attorney, was arraigned and pleaded not guilty. The Massiah opinion recognized the right of the government to continue its investigation after an indictment. It forbade the use of trickery to obtain incriminating statements after arrest and the retention of counsel. We hold that the holding in Massiah is not applicable to the recording of a meeting

held before arrest where, as here, the meeting had already been arranged prior to the filing of an information.

Appellants' second point is applicable to all the defendants. It urges that the court committed reversible error in allowing the use at the trial of a transcript of the recordings. The transcript was offered but not admitted into evidence. It was not submitted to the jury but it was used by one of the officers as he made voice identifications upon the recordings. It is appellants' position that the court in actuality permitted the officer to read verbatim to the jury from the transcript which was not in evidence.

The question presented fundamentally is one of the application of the best evidence rule. The tapes were admitted as the best evidence. The transcript was what someone else said the tapes contained.

The single authority cited by appellants for their position is United States v. Schanerman, 150 F.2d 941 (3rd Cir. 1945). This case stands only for the rule that even though tapes are of poor quality, they may be admissible if audible in part but that a transcription from the tapes is not.

Our reading of the record does not support appellants' position. We think that the transcript was properly used under the court's close supervision and that no error has been shown. Sims v. State, Fla.App. 1966, 184 So.2d 217. See Volusia County Bank v. Bigelow, 45 Fla. 638, 33 So. 704 (1903).

Appellants' third point urges error upon the failure of the court to provide for a preliminary hearing after the information was filed. This point has been decided contrary to appellants' position. State ex rel. Hardy v. Blount, Fla. 1972, 261 So.2d 172. In addition, appellants' only claim of prejudice is that their applications for bail were rendered less effective.

The fourth point claims various errors in the admission of statements of one or more of the co-conspirators. The question presented in each case is whether the court erred in applying the "co-conspirator rule." See Honchell v. State, Fla. 1971, 257 So.2d 889, and authorities therein cited. The point is presented with subsections and attacks the admission of many portions of the testimony. It is not necessary to set forth the testimony sought to be excluded. We think that it is sufficient to state that we have examined the portion objected to in each instance and we find that no reversible error appears. The evidence was sufficient to find that each of the appellants was a co-conspirator.

The fifth point claims that the testifying officer made the voice identification from the transcript of the tape and not from the tape. The record does not support appellants' claim. As the tapes were played, as each person spoke initially, the tape was stopped so that the witness could identify the new voice.

We pass the sixth point for later discussion and turn to the seventh point. It claimed that no conspiracy was shown to have existed because the evidence failed to establish an agreement to commit the crime. It is urged that the planners had not completed their arrangements

and therefore an agreement had not been reached. The position is not tenable upon this record. In State v. Smith, Fla. 1970, 240 So.2d 807, 810-11, the Supreme Court of Florida in discussing the sufficiency of an information charging that the defendant and others conspired to commit first degree murder, pointed out:

> ******
>
> "In charging a conspiracy to commit murder in the first degree, it is unnecessary to allege the manner or means by which the death of the victim is to be effected, for the crime of conspiracy may be committed prior to the time that the manner or means of effecting the death is determined by the conspirators. In other words, two or more persons could unlawfully combine, conspire, agree, or confederate with each other to commit murder in the first degree (thereby committing the crime of conspiracy) with the understanding that the means of accomplishing the unlawful homicide would be determined at a later date."
>
> ******

This record contains clear evidence that the defendants agreed to commit the crime of robbery. State of mind is not subject to direct proof but may be inferred from all the circumstances proved. Edwards v. State, Fla.App. 1968, 213 So.2d 274.

We have reserved for final consideration appellants' sixth point because the State has confessed error in the sentencing. Appellants' point urges that the verdicts were improper because the defendants were found guilty of two facets of the same crime, to wit: (1) conspiracy to

commit robbery and (2) conspiracy to commit grand larceny. The charge of the court was correct in informing the jury that they might find the defendants guilty of the lesser included offense. See State v. Smith, supra, 240 So.2d 807, at 809. But as conceded by the State, where it is obvious that the two convictions are but separate facets of the same transactions, only one sentence should be imposed, and that for the highest offense charged and proved. Torres v. State, Fla.App. 1972, 262 So.2d 458; Davis v. State, Fla. App. 1973, 277 So.2d 300.

Accordingly, the judgments are affirmed, the sentence of each defendant for conspiracy to commit grand larceny is reversed and all other sentences are affirmed.

Affirmed.